

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

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date:

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subject: Pre-AJCA Section 6707 Statute of Limitations

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

**ISSUE**

Whether the statute of limitations under section 6501 applies to assessment of the penalty for failure to register a tax shelter under the pre-American Jobs Creation Act of 2004 (AJCA) version of section 6707(a)(1).

**CONCLUSION**

The section 6501 statute of limitations does not apply to assessment of the pre-AJCA section 6707(a)(1) penalty.

**LAW AND ANALYSIS**

Pre-AJCA section 6111(a) provides that “[a]ny tax shelter organizer shall register the tax shelter with the Secretary (in such form and in such manner as the Secretary may prescribe) not later than the day on which the first offering for sale of interests in such tax shelter occurs.” Pre-AJCA section 6707(a)(1) imposes a penalty for the failure to register a tax shelter “if a person who is required to register a tax shelter under section

6111(a)" either "fails to register such tax shelter on or before the date described in section 6111(a)(1), or files false or incomplete information with the Secretary with respect to such registration." See Pub. L. 98-369, Div. A, Title I, § 141(a), July 18, 1984, 98 Stat. 680, and amendments in 1986 and 1997.

Section 6665(a)(1) states that penalties provided in chapter 68 "shall be assessed, collected and paid in the same manner as taxes..." Section 6671 redundantly provides that penalties provided for in Subchapter B of Chapter 68 "shall be assessed and collected in the same manner as taxes." The pre-AJCA section 6707 penalty is housed in Subchapter B.

Section 6501(a) provides that an assessment of tax must be made "within 3 years after the return was filed." For purposes of section 6501 (and the remainder of Chapter 61 of Subtitle F), the term "return" means the return required to be filed by the taxpayer. I.R.C. § 6501(a). The statutory language of section 6501(a), thus, provides that the applicability of section 6501 "depends on the filing of a tax return to begin the running of the limitations period." Sage v. United States, 908 F.2d 18, 25 (5th Cir. 1990) (holding that *no* period of limitations applies to the assessment of section 6700 penalties because a section 6700 penalty assessment does not depend on the filing of a tax return).

Accordingly, for purposes of determining the applicability of section 6501, the relevant inquiry here is whether the form upon which the tax shelter is registered is a "return." Courts have generally accepted a four-part test for determining whether a document is a valid "tax return": "First, there must be sufficient data to calculate tax liability; second, the document must purport to be a return; third, there must be an honest and reasonable attempt to satisfy the requirements of the tax law; and fourth, the taxpayer must execute the return under penalties of perjury." Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986). A tax shelter registration statement does not contain the information necessary to calculate a tax liability and, therefore, does not constitute a tax return under the Beard test.

The Internal Revenue Code provides for types of information returns other than tax returns. Form 8264, the form that a tax shelter organizer used to make a tax shelter registration in compliance with pre-AJCA section 6111, however, is not identified as an information return by the Internal Revenue Code (cf. I.R.C. § 6724(a); current I.R.C. §§ 6111(a) & 6707(a)). Therefore, the tax shelter organizer filing the registration statement could not purport to file an information return when submitting a registration statement because the form is not identified as a return under the governing provisions of the Internal Revenue Code, regulations, or other published guidance.

The current regulations under section 7701 provide that a return of tax is a return "reporting the liability of the taxpayer" or "any information return or other document identified in published guidance in the Internal Revenue Bulletin and that reports information that is or may be reported on another taxpayer's return under the Code if the

information reported on the information return or other document constitutes a substantial portion of the taxpayer's return within the meaning of paragraph (b)(3) of this section.” Treas. Reg. § 301.7701-15(b)(4). Although these regulations are not directly controlling, they are consistent with the general proposition that a document must either report a liability or be identified as an information return to be considered a return by the IRS.

Given the foregoing, the form upon which a tax shelter registration is made is not a return. The triggering event for the assessment of the pre-AJCA section 6707(a) penalty is the non-registration or improper registration of a tax shelter prior to the offering of the shelter for sale, not the filing of a return. Accordingly, the section 6501 statute of limitations does not apply to the assessment of the pre-AJCA section 6707(a)(1) penalty and the penalty under pre-AJCA section 6707(a)(1) may be assessed at any time. We note that our office has consistently taken this position for at least the past 10 years.

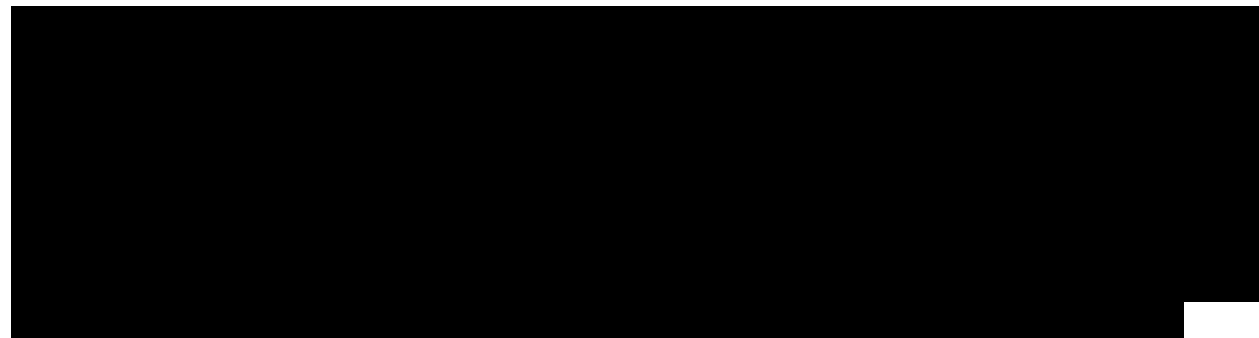
Your incoming request for advice inquires whether, for statute of limitations purposes, there is a difference between the situation when a registration is made untimely and when no registration is made at all. As discussed above, the application of section 6501 hinges on whether the document to be filed constitutes a return in the first instance. Because the form to be filed under pre-AJCA section 6707(a)(1) does not constitute a return, section 6501 does not apply. Whether the tax shelter organizer subsequently registers the tax shelter after the due date is irrelevant for statute of limitations purposes. If the Form 8264 is not filed by the due date, the pre-AJCA penalty applies and may be assessed at anytime whether or not a registration is ultimately filed.

In the AJCA, Congress replaced former section 6111 with a new disclosure obligation for a material advisor and replaced former section 6707 with a new related penalty for failure to comply with the new disclosure obligation. See Pub. L. 108-357 (118 Stat. 1418), §§ 815, 816. The assessment of the post-ACJA section 6707 penalty on a material advisor's “failure to file a return under section 6111 with respect to any reportable transaction” is subject to the section 6501 statute of limitations. As enacted by the AJCA, section 6111 requires a material advisor to “make a return” setting forth certain information about the reportable transaction in which the material advisor was involved. Concomitantly, section 6707, as enacted by the AJCA, imposes a penalty on the person “who is required to file a return under section 6111 with respect to any reportable transaction.” Congress clearly identified in the AJCA that the material advisor's new disclosure obligation is provided to the IRS on an information return. A Form 8264 filed pursuant to post-AJCA section 6111, therefore, constitutes a return. The same reasoning applies to Form 8264's successor, Form 8918. Accordingly, the assessment of the post-AJCA section 6707(a)(1) penalty is subject to the statute of limitations in section 6501.

It is true that the Form 8264 required to be filed by the tax shelter organizer under pre-AJCA sections 6111 and 6707 and the Form 8918 required to be filed by the material

advisor under current sections 6111 and 6707 are comparable forms. The forms, however, are filed under substantively different provisions of the Internal Revenue Code. Current sections 6111 and 6707 specifically refer to the disclosure statement filed by a material advisor as a return. In contrast, there is no indication that a person filing a registration statement in compliance with pre-AJCA sections 6111 and 6707 is filing a return under the governing provisions of the Internal Revenue Code, regulations, or published guidance. In sum, the entirely new statutory language in both sections 6111 and 6707, and the specific references to the requirement to file a return, account for the differential treatment afforded to the former and current versions of section 6707 with respect to the statute of limitations on assessment. The IRM reflects this distinction at 20.1.6.1.8 and 20.1.6.10.6.

#### CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS



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Please call Matthew D. Lucey at (202) 622-4940 if you have any further questions.